IN THE SUPREME COURT OF FLORIDA

CASE NO. 95, 849

THOMAS H. PROVENZANO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

WHETHER THE TRIAL COURT ERRED IN DENYING PROVENZANO'S MOTION FOR AN EVIDENTIARY HEARING ON ALLEGED INSANITY TO BE EXECUTED.

On page 20 of Appellee's Answer Brief, Appellee indicates that the threshold standard announced in Florida Rules of Criminal Procedure 3.210 is a greater threshold standard for relief than that required for postconviction relief. If Appellee is correct in that assumption, then its argument that the State's interest just prior to execution is much greater than prior to the time of trial is invalid. Postconviction is substantially later in the criminal process in relation to the initiation of Rule 3.210 (competence at time of trial). According to the Appellee's theory of a greater standard as the State's interest increases, it would be expected that the State's interest would increase by the time a case reached postconviction, and the threshold standard at postconviction would be greater than at time of trial. However, according to the Appellee's theory, the postconviction standard has decreased since the time of trial (initiation of Rule 3.210).

If the Appellee is arguing the specific threshold standard for a hearing to determine competency at time of trial versus competency at time of postconviction, the standard is identical. Carter v. State, 706 So. 2d 873 (Fla. 1988) (Until such time as the Florida Rules of Criminal Procedure are amended to specifically address competency during capital collateral proceedings, the rules for raising and determining competency at

trial should be looked to. See Fla. R. Crim. P. 3.210-3.212). If Appellee is arguing that the general threshold standard for an evidentiary hearing at postconviction is greater than that for a hearing under Rule 3.210, then Appellant contends Appellee is in fact wrong. Appellee acknowledges, at page 22 of their answer brief, that "a current expert opinion of incompetency" is sufficient to obtain an evidentiary hearing under Rule 3.210. However, in postconviction proceedings, in order for petitioner to obtain an evidentiary hearing, the petitioner's showing must not be conclusively refuted by the record. This standard is greater than that required by Rule 3.210.

Basically, the Appellee argues that there are three reasons why the threshold standard in Rule 3.811 is greater than the threshold standard required in Rule 3.210: (1) the State's interest is greater just prior to execution than prior to trial [answer brief, page 21], (2) that reasonable grounds pursuant to Rule 3.210 is "may" be incompetent as compared to "is" incompetent pursuant to Rule 3.811 [answer brief, page 22], and (3) the competency standard for execution is a "factual" understanding of the prisoner's impending death and the reason for it, as compared to "rational" understanding to appreciate the proceedings at time of trial [answer brief, page 22].

Appellant agrees with Appellee that the substantive purpose of Rule 3.210 is different than for Rule 3.811. Determination of competency for trial is different than for determination of competency to be executed. However, Appellant disagrees with

Appellee that the procedural safeguards are different. The language used within the rules for each are nearly identical and should be interpreted similarly. Where the language is the same and the interpretation of that language is the same, than the procedure should be the same. Public Employees Relations Commission v. City of Naples, 327 So. 2d 41 (2nd DCA 1976); O'Brien v. State, 478 So. 2d 497 (5th DCA 1985). As to Appellee's argument in (1) above, the Appellee suggests that because the interests of the State is greater just prior to execution than it is prior to trial, procedural due process is accordingly reduced. Appellee cites this Court's holding in Medina v. State, 690 So. 2d 1241 (Fla. 1997) and Justice Powell's concurring opinion in Ford v. Wainwright, 477 U.S. 399 (1986) as support for their argument.

Justice Powell's opinion appears to suggest that the rights of a prisoner during the entire criminal process are interdependent. As the State obtains conviction and judgment, the State's interest becomes greater and the need for procedural due process declines. This indicates that each right of the prisoner is intertwined, and as one right is satisfied the remaining rights are diminished. However, Justice Marshal's opinion appears to suggest that each right of the prisoner is mutually exclusive. Regardless of whether a judgment and conviction are attained by the State, each right thereafter is subject to the same procedural safeguards as the rights previous.

But it should make no difference which position this Court

adopts[1], because the increase in the State's interest only goes to the substantive aspect of competency, e.g., the higher standard of proof[2] and the lower standard of competency[3]. These are substantiative aspects of determination of competency to be executed. The vehicle to establish these aspects is due process, a procedural method. If the procedural method is also reduced, then the right given to a prisoner by "Uncle Sam" in one hand is effectively taken back by "Big Brother" with the other hand. The greater interest of the State to see the prisoner punished should not hinder the prisoner's ability to assert his right procedurally.

As to Appellee's argument in (2) above, the Appellee misstates the proper status of the law as to reasonable grounds pursuant to Rule 3.210 and Rule 3.811. Both rules themselves indicate "is."

> Rule 3.210(b): "if, at any material stage of a criminal proceeding, the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant **is** not mentally competent to stand trial..."
>
> Rule 3.811(e): "If the circuit judge, upon review of the motion and submissions, has reasonable grounds to believe that the prisoner **is** insane to be executed..."

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[1] It appears by this Court's discussion in Medina that the Court favors Justice Powell's position.

[2] Rule 3.210 requires preponderance of the evidence, while Rule 3.811 requires clear and convincing evidence.

[3] Rule 3.210 requires a rational appreciation for the process, while Rule 3.811 requires only a factual understanding of the impending death and why.

It was this Court that interpreted "is" as "may" in Scott v. State, 420 So. 2d 595 (Fla. 1982)(...the question before the court is whether there is a reasonable ground to believe the defendant may be incompetent, not whether he is incompetent. The latter issue should be determined after a hearing) and Tingle v. State, 536 So. 2d 202 (Fla. 1988)(the question before the court is whether there is reasonable ground to believe the defendant may be incompetent, not whether he is incompetent). By extrapolation and consistent interpretation, if "is" is interpreted to mean "may" in Rule 3.210, the logical conclusion for similar language in Rule 3.811 is that "is" also means "may" in Rule 3.811. Therefore, the Appellee is erroneous in suggesting that a different standard exists between the two rules.

As to Appellee's argument in (3) above, the Appellee is correct in suggesting that the ultimate goal of determination of competency under Rule 3.210 -- which is the mental capacity to appreciate the proceeding -- is different as compared to the ultimate goal of Rule 3.811, which is a factual understanding of the impending execution and the reason for it. However, that relates again to the substantiative aspects of the final determination and not to the threshold showing that the prisoner "may be incompetent to be executed."

As Justice Anstead noted in Medina :

> That doesn't mean that the State does not possess evidence to the contrary, and is entitled to present that evidence at a hearing. It simply means that the trial

> court must conduct a hearing and make a fair and just denovo determination of the issue of competency. A trial judge cannot just summarily accept the State's experts' opinions over those presented by the defendant. That is what judicial evidentiary hearings are for: to carefully and fairly assess and evaluate all of the evidence before rendering a fair and reasoned decision based on the evidence.
> 690 So. 2d at 1254.

The Appellee further argues in its answer brief on page 23, that regardless of the standard to be used, the Appellant failed to meet the reasonable grounds test under any standard. The Appellee attempts to support its argument by citing a number of cases. But in each case[4], only one document of support was provided. However, in the instant case a substantial amount of documentation was provided: Doctor's statement, family affidavits, inmate affidavits, prison medical records, and previous medical history. The Appellee cannot say that if the same documentation was provided to the courts in the cases cited, that those courts would not have granted relief.

Assuming that Justice Powell's concurring opinion in Ford is correct -- that the State's interest is great at time of execution -- that interest is for all practical purposes the same interest of the State at time of postconviction. Therefore, the standard or reasonable grounds for incompetency at time of

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[4] Lowenfield v. Butler, 843 F.2d 183 (5th Cir. 1988). The only documentation presented was one doctor's opinion. Evans v. McCotter, 805 F.2d 1210 (5th Cir. 1986). The only documentation presented was an affidavit from the sister of the prisoner. Card v. State, 497 So. 2d 1169 (Fla. 1986). This case doesn't even apply because the prisoner did not declare that he was incompetent to be executed.

execution should be construed to be the same as that for an evidentiary hearing at postconviction. If not, the standard for reasonable grounds should be no greater than that expressed in Rule 3.210, as expressed by Justice Anstead in Medina. In either case, the substantial current and historical documentation provided by Mr. Provenzano gives rise to reasonable grounds that Mr. Provenzano is incompetent, and the trial court abused its discretion by failing to provide Mr. Provenzano an evidentiary hearing.

ARGUMENT II

WHETHER FLORIDA RULES OF CRIMINAL PROCEDURE 3.811 AND 3.812, AS APPLIED VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellee argues at page 27 in its answer brief that this Court cannot consider the issue raised because the issue was not challenged before the trial court. The issue could not be raised before the trial court until the trial court ruled. It is precisely the trial court's order that is being challenged as applied. Appellant could not apprise the trial court that its ruling was unconstitutional because the order stated that it would not entertain a rehearing. The only avenue of relief for review of the trial court's order is by this Court.

Appellee also argues at page 27 in its answer brief that none of the alleged flaws apply to Mr. Provenzano. Appellee's argument is incorrect. Judge Johnson's order at page 6 states:

> "...does not find reasonable grounds to believe that Thomas H. Provenzano lacks the mental capacity to understand the fact of his impending execution and the reason for it, and therefore, finds that Thomas H. Provenzano is not insane to be executed within the meaning of applicable law."

The trial court only applied the factual understanding standard in determining that Mr. Provenzano failed to establish reasonable grounds. No consideration was given with regard to Mr. Provenzano's rational understanding. This failure of consideration is shown by the trial court's statement: "In Florida, a person is considered to be 'insane to be executed' if he or she 'lacks the mental capacity to understand the fact of

the impending execution and the reason for it.'" Mr. Provenzano contends that this standard is unconstitutional and in violation of his Eighth Amendment right not to be executed while insane.

Further, Appellee argues at page 27 and 28 of its answer brief that Mr. Provenzano cannot claim that the trial court's discretion to provide an evidentiary hearing once the threshold has been met as unconstitutional because Mr. Provenzano has not met the threshold to invoke the trial court's discretion. Appellee is correct that the trial court did not exercise its discretion as to an evidentiary hearing because the court found that reasonable grounds had not been met. However, as explained in Appellant's initial brief, this Court could find that the trial court abused its discretion by failing to find reasonable grounds, but not provide Mr. Provenzano with an evidentiary hearing. In that event, Mr. Provenzano is concerned that he be able to preserve this issue for further federal review.

Appellee states at page 28 in their brief that the amorphous characterization of "clear and convincing evidence" argued by Appellant would suffer the same characterization for any standard. Again, Appellee's argument is erroneous. Standards of proof are abstract cerebral concepts used to provide a trier of fact with some quantifiable level that can be related to a numerical position. One example is, the "preponderance of evidence" standard, which has been defined as "the greater weight of the evidence." Ballentine's Law Dictionary, Third Edition, 1969. Some describe this standard as slightly over 50%. This

standard has a static and definitive level. Reasonable doubt has been defined as "want of certainty" and "Lack of abiding conviction to a moral certainty." Id. Further, reasonable doubt has been defined by Florida Standard Jury Instructions in Criminal Cases as: lack of abiding conviction, or if having conviction it is one which is not stable but one which wavers and vacillates. Some describe this standard as in excess of 90%. This standard also has a static and definitive level. On the other hand, "clear and convincing evidence" has been described by this Court to be a "quantum of proof which requires more than a preponderance of the evidence but less than a reasonable doubt." Assuming preponderance is slightly over 50% and reasonable doubt is in excess of 90%, clear and convincing is somewhere between 51% and 90%. This standard is neither static nor definitive. "Amorphous" is defined as "lacking definite organization or form." In short, "clear and convincing evidence" is unconstitutionally vague.

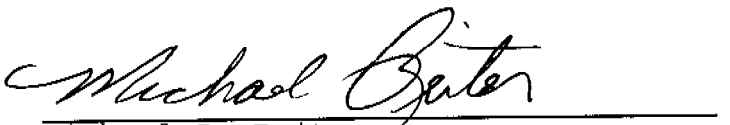
In Medina this Court rejected the preponderance of the evidence standard announced in Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373 (1996). However, this Court reasoned that Cooper was at the time of trial, while Media was at the time of execution. This Court did not consider that the reasoning behind the court in Cooper is the same as in Medina, as well as Mr. Provenzano.

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree

of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.

CERTIFICATE OF FONT SIZE AND OF SERVICE

I HEREBY CERTIFY that the foregoing **REPLY BRIEF OF APPELLANT**, which has been typed in Font Courier 12, has been furnished by either United States Mail, first-class/federal express/facsimile transmission/hand delivery this **6th** day of August, 1999.



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